

UNITED STATES OF AMERICA,

No CR 93-0438 VRW

Plaintiff,

ORDER

v

KEVIN PAUL WOODRUFF,

Defendant.

Kevin Paul Woodruff ("defendant") committed robbery of three jewelry stores and attempted robbery of another jewelry store in March of 1991. United States v Woodruff, 50 F3d 673, 675-76 (9th Cir 1995). Defendant was convicted of four counts of "interference with commerce by threats or violence" in violation of the Hobbs Act, 18 USC §1951(a). Doc #289. The three jewelry stores which defendant successfully robbed suffered financial losses from the robbery and were forced to close to replenish their inventories or repair damage. United States v Woodruff, 1999 WL 776213, \*1 (Sept 29, 1999, 9th Cir). At the sentencing hearing, the court relied on the pre-sentence report which indicated damage

1 to the three jewelry stores in the total amount of \$625,000. Doc  
2 #301 at 37. The pre-sentence report did not reflect the dollar  
3 amount of damage to Sam Bloch, the fourth jewelry store. Doc #301  
4 at 37. The court therefore ordered restitution of \$625,000 on July  
5 14, 1998, without taking into account the potential damage to Sam  
6 Bloch. Doc #301 at 37.

7 Defendant filed a "motion to vacate and/or set aside  
8 court ordered restitution" on December 7, 2007. Doc #459.  
9 Defendant argues that the court's restitution order must be set  
10 aside because the court failed to consider factors such as  
11 defendant's ability to pay before the imposition of the restitution  
12 order. Doc #459 at 2. Specifically, defendant asserts that the  
13 restitution judgment is inconsistent with his alleged status as an  
14 "indigent." Doc #459 at 2.

15 For the reasons that follow, this court DISMISSES  
16 defendant's motion to vacate and/or set aside the restitution order  
17 for a lack of jurisdiction.

18 The court first must address the threshold issue of  
19 whether it has jurisdiction. United States v Morales, 328 F3d  
20 1202, 1204 (9th Cir 2003). Federal courts are courts of limited  
21 jurisdiction. United States v Jacobo Castillo, 496 F3d 947, 951  
22 (9th Cir 2007). Apart from the narrow circumstances prescribed by  
23 statute or Rule 35, a district court lacks the authority to alter a  
24 sentence. United States v Barragan-Mendoza, 174 F3d 1024, 1028  
25 (9th Cir 1999)(citing 18 USC §3582(c)(1)(B)). Defendant  
26 acknowledges (Doc #459 at 3) and the court agrees that complaints  
27 concerning the restitution order cannot be addressed in a §2255  
28 proceeding. See United States v Thiele, 314 F3d 399, 401 (9th Cir

1 2002).

2 Similarly under Rule 35, this court lacks jurisdiction to  
3 correct or reduce defendant's sentence. The former Rule 35  
4 permitted a defendant to make a motion to correct an illegal  
5 sentence at any time. See United States v Youpee, 836 F2d 1181,  
6 1182 (9th Cir 1988)(construing the defendant's motion to vacate the  
7 restitution order on the basis that a district court failed to  
8 consider the defendant's earning ability as a motion to correct a  
9 sentence under Rule 35(a)). The current Rule 35, which applies to  
10 crimes committed after November 1, 1987, however, provides that a  
11 district court may alter a sentence only in the following  
12 circumstances: (1) if "an arithmetical, technical, or other clear  
13 error" occurred during the imposition of the sentence and the court  
14 redressed it within seven days of the imposition, (FRCrP 35(a)), or  
15 (2) after a defendant has given post-sentence cooperation and  
16 assistance in the investigation or prosecution of another person,  
17 and the government has made a motion to reduce the defendant's  
18 sentence (FRCrP 35(b)).

19 This case does not fall under either of the circumstances  
20 envisioned in Rule 35 for a proper exercise of jurisdiction. Post-  
21 sentence assistance is not at issue here. The seven-day window  
22 after defendant's sentencing closed more than nine years before  
23 defendant filed this motion. See Morales, 328 F3d at 1204 (holding  
24 that after seven days of sentencing, the district court loses  
25 jurisdiction to correct the sentence); United States v Chan, 2007  
26 WL 2949552, \*2 (ND Cal, Oct 10, 2007)(holding that the court could  
27 not reduce the defendant's restitution judgment after seven days of  
28 sentencing). Defendant also does not argue that the restitution

1 order was due to an arithmetic or technical error. Consequently,  
2 under Rule 35 the court lacks jurisdiction to revisit defendant's  
3 restitution judgment.

4         The statutory basis for jurisdiction to reconsider a  
5 restitution judgment is also inapplicable in this case. Defendant  
6 errs in asserting that 18 USC §3572(a)(1), which enumerates factors  
7 to be considered in the imposition of a fine, grants this court  
8 jurisdiction. Doc #459 at 1. Other than Rule 35, a district court  
9 may alter the sentence after an appellate court remands and directs  
10 the district court to reconsider or recalculate the sentence. 18  
11 USC §3742; United States v Henrique, 988 F2d 85, 86 (9th Cir  
12 1993)(holding that the version of Rule 35 applicable to crimes  
13 committed after November 1, 1987, permits a district court to  
14 correct a sentence only on remand from the appellate court).  
15 Defendant did not timely appeal this issue and no remand on the  
16 restitution judgment has occurred. Woodruff, 198 F3d 256  
17 (affirming this court's judgment on defendant's appeal from his  
18 conviction and sentence for interference with commerce by means of  
19 a robbery in violation of the Hobbs Act).

20         In any event, defendant's motion is without merit. Under  
21 the Victim and Witness Protection Act ("VWPA"), 18 USC §3663, the  
22 court may order restitution to crime victims. United States v  
23 Lawrence, 189 F3d 838, 846 (9th Cir 1999). In determining the  
24 amount of restitution, the district court is required to consider  
25 (1) the amount of loss sustained by the victim; (2) the financial  
26 resources of the defendant, and (3) the financial needs and  
27 earnings of the defendant and the defendant's dependents. 18 USC  
28 §3664(a); United States v Sablan, 92 F3d 865, 870-71 (9th Cir

1 1996).

2 VWPA does not require the district court to make factual  
3 findings to support its conclusion, United States v Cannizzaro, 871  
4 F2d 809, 811 (9th Cir 1989), or to discuss the factors of section  
5 3664 on the record. United States v Grewal, 825 F2d 220, 223 (9th  
6 Cir 1987). In order to meet the statutory requirement, the record  
7 need only reflect that the district court judge had at his disposal  
8 information bearing on the considerations of section 3664.

9 Cannizzaro, 871 F2d at 811. A district court's reference to a pre-  
10 sentence report which contains information concerning a defendant's  
11 financial resources provides a sufficient basis for concluding that  
12 the court fulfilled its responsibilities under section 3664.

13 Cannizzaro, 871 F2d at 812. In this case, the court not only made  
14 specific reference to but relied on the pre-sentence report which  
15 included information regarding defendant's financial resources.  
16 Doc #301 at 36-37. Consequently, in reaching the restitution  
17 amount on the basis of the pre-sentence report, the court  
18 discharged its responsibilities under section 3664.

19 Defendant argues that the order was inconsistent with his  
20 status as an indigent. Doc #459 at 2. This is incorrect. A  
21 defendant's present indigence is not sufficient to preclude a  
22 restitution order. United States v Smith, 944 F2d 618, 623 (9th  
23 Cir 1991). Imposing restitution on indigent persons is deemed  
24 appropriate in the Ninth Circuit "because the defendant's future  
25 financial status is indeterminable and could change." Sablan, 92  
26 F3d at 871 (citing United States v Jackson, 982 F2d 1279, 1284 (9th  
27 Cir 1992)).

28 Defendant also argues that the court erred in failing to

1 conduct a hearing. Doc #459 at 3. To the contrary, VWPA does not  
2 require the sentencing court to conduct a hearing on the issue of  
3 restitution. United States v Rice, 38 F3d 1536, 1546 (9th Cir  
4 1994). Congress did not intend VWPA to transform a sentencing  
5 hearing to a "second trial" on the issue of restitution. Rice, 38  
6 F3d at 1546; United States v Cloud, 872 F2d 846, 855 n 11 (9th Cir  
7 1989). Rather, the relevant inquiry is whether a defendant was  
8 given notice and due process or an opportunity to speak on the  
9 issue of restitution. Rice, 38 F3d at 1546. In United States v  
10 Keith, the Ninth Circuit held that the district court provided the  
11 required notice and due process because the defendant and his  
12 counsel were given an opportunity to speak or to comment on the  
13 pre-sentence report. 754 F2d 1388, 1393 (9th Cir 1985). Similarly  
14 here, the court provided defendant with notice and due process when  
15 it asked if there was anything to add at the sentencing hearing.  
16 Doc #301 at 37. Defendant failed to object to the restitution  
17 order or to comment on the accuracy of the pre-sentence report.

18 In light of the court's decision above, defendant's  
19 motion to vacate and/or set aside the court-ordered restitution  
20 portion of the judgment is HEREBY DISMISSED.

21  
22 IT IS SO ORDERED.

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24   
25 VAUGHN R WALKER  
26 United States District Chief Judge  
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